IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 774 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDULKARIM FAJALBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR NK MAJMUDAR for Appellant(s) : 1,
MR PRADIP D BHATE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 12/04/2007

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellant alongwith his wife Zubedabibi Abdulkarim came to be tried by City Sessions Court in Sessions Case No.211 of 1995 for the offence of murder, hurt, grievous hurt and commission of breach of Notification prohibiting carrying of weapon under the Bombay Police Act.

2. The case against original accused persons was that on 28th June, 1994 at about 1400 hours when Abdulrashid Fajalbhai Shaikh - brother of the appellant was taking his meals with his wife Raziabanu at his home in Ramjinipole, Shahpur area of Ahmedabad, the appellant and his wife Zubeda charged into the house, had an altercation over the property and then the appellant inflicted blows on Abdulrashid with the knife that he had brought with him and upon intervention by Raziabanu - wife of Abdulrashid, caused hurt to her as well as grievous hurt to minor Nahida. Neighbour Samsuddin Pyarmahmed was standing outside his house and he also saw the occurrence. Another person Zahir Gulamhussain Kagdi took the deceased to the hospital where the deceased was declared dead. Raziabanu - wife of deceased Abdulrashid lodged the F.I.R. with Shahpur Police Station on basis of which offence was registered. Investigation was made and ultimately, the Investigating Officer, having found sufficient material against the appellant and his wife, filed chargesheet in the Court of Metropolitan Magistrate who, in turn, committed the case to the Court of Sessions and Sessions Case No.211 of 1995 came to be

registered.

2.1 Charge against the appellant and his wife Zubedabibi was framed at Exh.2 initially for the offences punishable under Section 302, 302 read with Section 114 of I.P.C. and Section 135(1) of Bombay Police Act. Later on, charge was altered and additional charges punishable under Sections 324 and 326 of I.P.C. came to be added for causing hurt to Raziabanu and grievous hurt to Nahida. On both the occasions, both the accused pleaded not guilty to the charges and claimed to be tried.

2.2 The prosecution led the evidence and considering the evidence led by the prosecution, the Trial Court came to the conclusion that the prosecution could not successfully establish charges against original accused no.2 – Zubedabibi and, therefore, acquitted her of the charges.

2.3 However, the Trial Court concluded that original accused no.1 – present appellant was proved guilty of murder of his brother – Abdulrashid Fajalbhai and hurt to Raziabanu and grievous hurt to Nahida, but not for breach of Notification under the Bombay Police Act punishable under Section 135 of the said Act and accordingly recorded conviction/acquittal by judgment and order dated 30th June, 1998.

2.4 The Trial Court sentenced the appellant to

undergo imprisonment for life and to pay a fine of Rs.500/-, in default, to undergo R.I. for three months for the offence of murder. For the offence of grievous hurt, the Trial Court awarded R.I. for five years and fine of Rs.500/-, in default, to undergo R.I. for two months and for the offence of hurt punishable under Section 324, the Trial Court awarded R.I. for one year and imposed a fine of Rs.100/-, in default, to undergo R.I. for one month to the appellant. Aggrieved by the said judgment and order, the original accused no.1 – Abdulkarim Fajalbhai Shaikh has preferred this appeal.

3. We have heard learned advocate Mr. N.K. Majmudar for the appellant and learned APP Mr. Bhate for the respondent – State.

4. Learned advocate Mr. Majmudar submitted that the case depends mainly on evidence of eye-witnesses Raziabanu Abdulrashid and Samsuddin Pyarmahmed. Raziabanu happens to be the widow of the deceased and Samsuddin, a neighbour. Both of them are, therefore, interested witnesses and, therefore, their evidence may be given a closer scrutiny.

4.1 Mr. Majmudar submitted further that the dispute between the two brothers was on account of property. There was an altercation, heated exchange of words and scuffle and in that, the incident occurred and the deceased sustained injuries. It was not a planned murder and, therefore, conviction for

the offence of murder is erroneous.

4.2 Mr. Majmudar submitted further that Samsuddin cannot be considered an eye-witness. He was standing outside the house when the incident occurred and all that he could have seen would be seeing the accused entering the house or leaving the house. He, therefore, submitted that his evidence may not be given any weightage.

4.3 Mr. Majmudar submitted that a witness who has reached the place soon after the incident and was sought to be projected as an eye-witness namely, Zahir Gulamhussain Kagdi has not supported the prosecution case. Under the circumstances, the evidence of the prosecution cannot be considered as of a sterling quality and it cannot be considered that the charges are proved to the hilt; beyond reasonable doubt and, therefore, the appeal may be allowed.

4.4 It was submitted that the appellant has 7 children, youngest one was aged about a year and a half when the evidence was recorded and the case, therefore, may be considered sympathetically.

5. Learned APP has opposed this appeal. According to him, eye-witnesses - Raziabanu Abdulrashid and Samsuddin Pyarmahmed have fully supported the prosecution case. Simply because Raziabanu happens to be widow of the deceased, she

cannot be disbelieved or her deposition cannot be discarded unless it is shown that she is not telling the truth. On the contrary, presence of Raziabanu is natural, her deposition is natural and she has remained unshaken in the cross-examination. Likewise, witness Samsuddin is also a natural witness. It is not correct that he was standing outside the house throughout the incident but it has come on record that he entered the house immediately after the appellant on noticing the appellant entering the house with a knife in his hand. He is a neighbour of the deceased as well as that of the accused because the accused was staying on the upper storey of the house and, therefore, he being a neighbour by itself will not render his deposition susceptible to doubt. Learned APP, therefore, submitted that the Trial Court has considered all these aspects and, therefore, convicted the appellant.

5.1 So far as convictions under Section 324 and 326 of I.P.C. are concerned, there is ample medical evidence in the form of certificates (Exh.23 and 24) to show that Raziabanu and Nahida both suffered injuries. X-ray of Nahida indicates presence of fracture of right parietal bone which would bring the hurt under the definition of grievous hurt. The Trial Court was, therefore, justified in recording the conviction. The conviction, therefore, may be upheld and the appeal may be dismissed.

6. We have examined the record and proceedings in context of the contentions raised by rival sides before us.

7. At the outset, we may state that evidence in form of Dr. Vinayakrav Vasudevrav Patil (Exh.47) and post-mortem notes at Exh.20 go to show that the deceased had an incised wound on right side of the neck of the size of 11 x 5.5 x 5.5 cm which had cut the bigger vessels of neck like jugular vein, external and internal carofid vessels, vertebro column and inner spinal cord. There were other incised wounds, three in number, on the left side of the chest, right side over the lip and right side of neck and right cheek. The death was caused due to haemorrhage and shock because of the injuries.

7.1 The doctor has deposed that the injuries were sufficient in ordinary course of nature to cause death and were possible with Muddamal article no.1 – knife.

7.2 In light of the above evidence, the Trial Court was justified in coming to the conclusion that the deceased met with a homicidal death.

8. So far as hurt to Raziabanu Abdulrashid and grievous hurt to Nahida is concerned, there are medical certificates at Exhs.23 and 24.

8.1 Exh.23 refers to injuries sustained by

Raziabanu. The case history is of assault with Chhara (knife). There were two incised wounds noticed on right hand palm aspect and left great toe.

8.1.1 Medical certificate (Exh.24) indicates the injuries sustained by Nahida where the history is of beating given by uncle. There three contused lacerated wounds were noticed and recorded by the doctor and x-ray sketch of vertebra indicated fracture of right parietal bone. These certificates were issued by Dineshbhai Savjibhai Chandana who is examined at Exh.46. He confirms having issued medical certificates (Exhs.23 and 24).

8.2 It is clear that the prosecution has proved that Raziabanu and Nahida have suffered hurt/ grievous hurt respectively.

9. Now comes the vital question as to who committed the murder or who caused hurt or grievous hurt. In this regard, if deposition of Raziabanu Abdulrashid (Exh.12) is seen, she says that the incident occurred on 28th June, 1994 in her house around 1.30 to 2.00 p.m. At that time, she and her husband were taking meals. At that time, Abdulkarim came with a knife in his hand and inflicted a blow on the neck of her husband i.e. deceased Abdulrashid. She says that wife of Abdulkarim was also with him and was shouting 'Pata daalo, Pata daalo' (do away, do away). As a result, Abdulkarim inflicted further blows. The witness says that she intervened to save

her husband and at that time, the appellant inflicted blow on her also on her right hand and left leg. She says that injury was also caused to her daughter Nahida on head and left hand. The dispute was because of the house. She identifies the accused and she says that after the incident, they had left the place. The neighbours came and then Ezazbhai Patel. He summoned the ambulance and took her husband to V.S. Hospital where her husband was declared dead. She was sent back after giving treatment whereas her daughter was admitted to the hospital. The witness failed to identify Muddamal article no.1 as the knife used in commission of the offence.

9.1 During cross-examination, suggestions regarding the distribution of properties are made. Suggestions are also made to indicate that the accused was brought up by the deceased. It has also come in evidence during cross-examination of this witness that the accused has 7 children, the youngest being a daughter aged a year and a half.

9.1.1 As regards the incident, the wife admits that there was an altercation between the two brothers regarding the property and that her husband had indicated that when the construction of the upper storey is over, he may sell off the property. She denies a suggestion that in the altercation, her husband had become angry and that out of provocation, he assaulted accused no.1 with a dagger. The witness is unable to state as to whether accused no.1 –

appellant sustained any injury during the occurrence. She says that her condition was such that she could not observe all these things in detail. She is not able to state accurately whether there was a scuffle between the deceased and the appellant. She denies a suggestion that when she tried to intervene, minor Nahida was with her and, therefore, Nahida sustained injury in the transaction.

10. P.W.2 – Zahirbhai Gulamhussain Kagdi is examined at Exh.22. According to the prosecution case, he is a witness who had reached the spot soon after the incident and had noticed the appellant Abdulkarim in a blood-stained condition and his brother – deceased Abdulrashid lying on the floor bleeding profusely. It is also the prosecution case that the accused appellant no.1 – Abdulkarim had made an extra-judicial confession before this witness. The witness has, however, not supported the prosecution case and is treated as hostile to the prosecution.

11. The third and most important witness is Samsuddin Pyarmahmed (Exh.25). He is a neighbour who is staying opposite the house of the accused/the deceased. He says that the incident occurred on 28th June, 1994 at about 2.00 p.m.; in front of his house; in the house of Abdulkarim. He says that he was standing near the door to his house at about 2.00 p.m. He noticed Abdulkarim coming with a knife and rushing into the house. He, therefore, followed him.

At that time, wife of Abdulkarim was shouting 'Pata daalo, Pata daalo' (do away, do away). At that time, Abdulrashid had his daughter in his hand. In the assault, Abdulkarim caused injury to that minor daughter. He also inflicted blows on wife of the deceased also. He states that the injuries were caused by the knife on neck of Abdulrashid. He says that Muddamal article no.1 is the knife which was used by the appellant Abdulkarim in the incident. Then he identifies the accused persons.

11.1 The witness is put to a stern and detailed cross-examination but nothing turns in favour of the accused – appellant. On the contrary, the answers obtained during cross-examination strengthen the case of the prosecution. It emerges from the cross-examination that the witness followed the appellant in the house on seeing him with a knife. He says that he tried to get hold of the hand of appellant no.1 and ask him as to what is he bent upon to do. He says that before he could catch hold of Abdulkarim, he had inflicted the knife blow to Abdulrashid and thereafter he was able to take away the knife from the accused. He says that he went to the hospital after about an hour and offered an explanation that because he was wearing a 'lungi', he could not accompany the accused/deceased to the hospital. He firmly states that there was no scuffle between the accused and the deceased. He also denies the suggestion that Abdulrashid committed assault with a knife on Abdulkarim and, therefore, he

sustained injury.

12. P.W.4 – Anwarhussain Usmangani Kagdi (Exh.26), p.w.5 – Sirinbanu Mahmediqbal (Exh.27) and p.w.6 – Rajjabbhai Kalubhai (Exh.28) are the witnesses who have not supported the prosecution case and have been treated hostile to the prosecution.

13. The Investigating Officer – P.I. Madarsinh Bhikhaji Solanki is examined at Exh.33. It has been proved through him that witness Samsuddin had not stated in his police statement that he had gone into the house and that he snatched away the knife from the appellant. Similarly, the contradictions in the deposition of Zahirbhai Gulamhussain Shaikh (Exh.22) have been proved through deposition of this witness by the prosecution also.

14. If the evidence as stated above is seen, it is clear that Raziabanu (Exh.12) and Samsuddin Pyarmahmed (Exh.25) both have supported the prosecution case. They are witnesses to the incident and they clearly implicate the appellant. Of course, there is an additional factor emerging in the deposition of Samsuddin that he entered the house but that by itself does not change the texture of his deposition for the reason that when he describes the entire incident in his statement and when the incident has occurred inside the house, he could not have described the incident without entering the house. So at the most, it may be considered as an

omission on his part in stating before the police that he had entered the house. Apart from this, there is no material to shake the evidence of the two eye-witnesses or render their depositions doubtful. Despite close scrutiny, neither we are able to find out any material nor learned advocate for the appellant is able to point out such material which would render the depositions doubtful. Simply because Raziabanu is a relative, her deposition cannot be discarded. On the contrary, her presence at the place is very natural. The incident has occurred in her own house while she was having her meals with her husband and who else can be a better witness in such a situation. The contention that Samsuddin is not an eye-witness, therefore, cannot be accepted nor can deposition of Raziabanu be discarded.

14.1 So far as contention regarding exercise of right of private defence is concerned, it has been taken both during the cross-examination of witnesses as well as the statement under Section 313 of CrPC but we find that none of the two witnesses have specifically suggested that the deceased had first committed assault with a knife. It has also not come in evidence that there was any scuffle between the two. There was an altercation where it is indicated that the deceased stated that he will sell off the house but that cannot be considered as an assault which would entitle the appellant to exercise right of private defence nor can it be considered

sufficient to bring the case under any of the exceptions of Section 300 of I.P.C. because it cannot be considered as a grave and sudden provocation. It cannot be overlooked that the appellant has entered the house of the deceased on his own, armed with a knife or may be a butcher's knife! He had no reason to carry such weapon with him. This reflects his mindset, intention and determination. Added to this is the nature of injuries caused on the deceased. He has virtually cut the neck of the deceased, as can be seen from the post-mortem notes! These pieces of evidence conclusively prove that the death of the deceased was caused by the appellant in presence of Raziabanu & Samsuddin. At the same time, he also caused hurt & grievous hurt to Raziabanu & Nahida respectively. There are medical certificates & doctor's oral evidence to prove this aspect.

15. We may refer to the report of the F.S.L. (Exh.15) where the clothes of the appellant and the dagger both are found to carry blood marks of the group of the deceased. Of course, the sample of blood taken from the dead body is indicated to be unidentifiable blood group but his blood group can be identified from the samples taken with the help of swab from the place of incident and the clothes of the deceased. This independent evidence also proves the case against the appellant.

16. In light of the foregoing discussion, we are unable to accept any of the contentions raised by

learned advocate for the appellant. The conviction by the Trial Court is well-founded and deserves to be upheld. The appeal, therefore, must fail and stands dismissed. The judgment and order dated 30th June, 1998 rendered by learned Additional City Sessions Judge, Court No.22, Ahmedabad in Sessions Case no.211 of 1995 is confirmed.

(A.L. Dave, J.)

(Sharad D. Dave, J.)

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